REVIEW
of the
OCCUPATIONAL HEALTH AND SAFETY ACT

The Hon. Elizabeth Witmer
Minister of Labour

February 1997

Ministry of Labour

Office of the Minister

400 University Avenue
14th Floor
Toronto ON M7A 1T7
Telephone: (416) 326-7600
Fax: (416) 326-1449

Ministère du Travail

Bureau du Ministre

400, avenue University
14e étage
Toronto (Ontario) M7A 1T7
Téléphone : (416) 326-7600
Télécopieur : (416) 326-1449

Ontario

Dear Reader:

The Government of Ontario envisions an occupational health and safety system that will make Ontario workplaces among the safest in the world. As part of the government's plans to achieve this goal, the Ministry of Labour is proceeding with a review of the Occupational Health and Safety Act. The first major step in this review involves the release of this discussion paper.

Health and safety legislation should encourage employers, employees and employee representatives to create a workplace environment in which there is a demonstrated, mutual commitment to, competence in, and accountability for health and safety on the part of everyone in the workplace. Such an environment will inevitably lead to fewer workplace injuries and illnesses.

In order to achieve this government's ambitious goal of health and safety excellence, fundamental changes are needed to create legislation that is relevant to the rapidly changing workplace and effective in achieving improvement in the health and safety record of the province.

The review is guided by four key principles: prevention, workplace partnership, effective enforcement and economic growth.

You are invited to participate in the reform process by responding to me in writing or you can send your comments by e-mail to: ohsa@gov.on.ca

You can also visit our web site at: http://www.gov.on.ca/LAB/main.htm

Submissions should be received by April 30, 1997.

Thank you for taking the time to read this discussion paper and for participating in the important exercise of reforming occupational health and safety law in Ontario.

Sincerely,

Elizabeth Witmer, MPP
Minister of Labour

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PURPOSE OF THE REVIEW AND THE DISCUSSION PAPER

The review of occupational health and safety legislation is driven by this government's overall vision for health and safety:

- a co-ordinated health and safety system where the Ministry, its agencies and the employers and employees of Ontario all work together toward a common goal: to create among the safest workplaces in the world.

Our review of the Occupational Health and Safety Act is guided by four key principles: prevention, workplace partnership, effective enforcement and economic growth.

The discussion paper outlines the objectives of the review, makes the argument for reform, and provides background information on the existing legislation.

Specific review issues, on which input is sought, are presented in detail. Some issues have been prompted by the government's vision for the future. Some have come up in informal discussions with stakeholders. Other issues have arisen from the experiences of Ministry of Labour staff who work with the legislation.

The paper provides some questions to help focus discussion and feedback. The questions are not intended to limit input or debate in any way. The paper also explains how to participate in the discussion.

RATIONALE FOR REVIEW AND OVERHAUL OF LEGISLATION

Fundamental changes in direction and focus are needed to create legislation that is relevant to the rapidly changing workplace, and effective in achieving improvements in the health and safety record of the province.

The existing legislative framework for occupational health and safety stresses process and procedure rather than outcomes. It emphasizes government involvement and does not adequately recognize the responsibility and accountability of the workplace parties. There are few incentives for employers and employees to strive for excellent health and safety performance.

In March, 1996, the Ministry introduced the first phase of reform to Ontario's occupational health and safety system.

In November, 1996, the government introduced new workers' compensation legislation, the Workplace Safety and Insurance Act, 1996 (Bill 99). The legislation, which does not take effect until approved by the Legislature, would entrench the goal of prevention of injury and illness as a top priority of the Workers' Compensation Board, renamed as the Workplace Safety and Insurance Board.

With this review of the Occupational Health and Safety Act, the Minister of Labour is building on the reforms already undertaken.

The review and public discussion are governed by

- an approach to reform that is consistent with the Ministry of Labour's role of setting, communicating and enforcing standards;
- the intention to create legislation that is clear, easy to use and relevant to today's workplace;
- a desire to listen to and consult with the employees and employers of Ontario in order to make appropriate changes to the legislation.

GUIDING PRINCIPLES OF THE REVIEW

There are four guiding principles for the review; these principles will be reflected in the new legislation.

1) Prevention of Workplace Injury and Illness

Workplace health and safety are essential to individual well-being and welfare and to harmonious, productive workplaces.

Health and safety legislation should give employees and employers the tools they need to carry out front-line responsibility for eliminating workplace hazards and achieving optimum health and safety performance.

This can only be achieved by making the prevention of illness and injury, and the setting of stringent safety standards the first priority of employers, employees, and the government.

2) **Workplace Partnerships**

To achieve the goal of significantly improved health and safety performance, the Occupational Health and Safety Act must support a partnership among everyone in the workplace.

The legislation should encourage self-reliant, co-operative workplaces--where employees and employers share responsibility for prevention of injury, high health and safety standards and good workplace practices.

3) **Effective Enforcement**

Enforcement of the health and safety legislation is a key priority for the Ministry of Labour. The Ministry is committed to working with everyone in the workplace to ensure that there is compliance with health and safety standards.

4) **Economic Growth**

In addition to the personal losses resulting from workplace injuries and illness, there are significant consequences for the overall economy.

Workplaces that are safe and healthy are more productive and competitive. They are able to contribute to job creation and economic growth.

A reformed Occupational Health and Safety Act is a key element in securing continued prosperity for Ontario.

OBJECTIVES OF THE REVIEW AND KEY AREAS FOR DISCUSSION

The review of the Act has a number of objectives:

- to establish and maintain the internal responsibility system as the foundation of the health and safety legislation;
- to design legislation that is flexible in terms of how compliance is achieved and maintained;
- to design legislation that will achieve goals such as prevention, self-reliant workplaces and best workplace practices;
- to eliminate red tape and any overlap and duplication with other legislation, both provincial and federal;
- to make the Act easier to understand and apply.

Discussion is invited in all these areas. The paper asks for specific suggestions and recommendations on how to make the "internal responsibility system" (IRS) more effective. The IRS refers to the principle whereby employers and employees have the primary responsibility for workplace health and safety.

The review invites discussion on where flexibility might be introduced.

Provisions related to the role and function of joint health and safety committees, the right to refuse unsafe work and the duties of the workplace parties are all examined.

Finally, the review addresses issues such as the scope, application and enforcement of the Act.

HOW TO PARTICIPATE IN THIS REVIEW

The government will be consulting interested parties on reforms to the Act. This process will involve informal meetings with individuals and groups in Toronto, and in the following regional centres: Windsor, Kitchener-Waterloo, Niagara Falls, Thunder Bay, Sudbury, Kingston and Ottawa.

The government invites written submissions from all interested parties. They should be received by the Ministry of Labour no later than April 30, 1997 and sent to the following address:

Elizabeth Witmer, MPP
Minister of Labour
Occupational Health and Safety Act Review
400 University Avenue, 15th Floor
Toronto, Ontario
M7A 1T7

Attention: Project Leader

You may also send your comments to the Ontario Government's e-mail address at: ohsa@gov.on.ca

You can visit our web site at: http://www.gov.on.ca/LAB/main.htm

For additional copies of this discussion paper, or for inquiries about the consultation process, please call the Ministry of Labour, Communications Branch, at (416) 326-7400.

QUESTIONS CONTAINED IN THE DISCUSSION PAPER

A. Enhancing Flexibility

1. Are there sections of the Occupational Health and Safety Act (the Act) where specifications and procedures could be amended or replaced with performance-based objectives and where red tape could be eliminated?

2. What are your views on the Ministry of Labour's proposed shift to the development of performance-based health and safety regulations?

3. What are your suggestions concerning approaches to recognizing exceptional performers? Specifically, comments are being sought on:

   - the criteria to evaluate an employer's health and safety performance;
   - aspects of workplace health and safety management that can be assumed by "exceptional" workplaces with minimal government intervention; and,
   - how financial incentive programs could be developed or modified and applied.

4. How can the Act and its administration be made more responsive to the needs of small business? In particular, how can

   - the Internal Responsibility System (IRS) be effectively implemented in small workplaces; and,
   - the requirements for health and safety representatives and joint committees be made more suitable to small businesses?

B. Enhancing Self-Reliance

5. Should an explanation of the IRS:

   - be set out in a Ministry policy document available to the public and stakeholders?
   - be included in an interpretive preamble to the Act?
   - be included within the Act (e.g. in a purpose clause)?
   - remain a general concept open to interpretation by workplace parties to meet their particular needs and circumstances?

6. What would you consider to be the elements of an IRS that would lead to safe and healthy workplaces and ensure compliance with the Act?

7. How can the requirement for a health and safety policy and implementation program be modified so that the policy and program can be used more effectively to strengthen the IRS in the workplace?

8. Should a constructor be required to have a health and safety policy and program for the whole construction project?

9. Should a purpose clause be added to the Act, and if so, what objectives should be included in it?

10. What duties and responsibilities should be assigned to the various workplace parties, taking into account,

    - the changing nature of work;
    - the appropriate level of accountability for health and safety?

11. Should other parties, whose services are essential to the maintenance of workplace health and safety, be covered by the Act and have appropriate obligations assigned to them?

12. How can the requirements respecting joint health and safety committees (JHSC) (and worker representatives) be changed to

    - increase the effectiveness of committees and representatives;
    - give the workplace parties more flexibility; and
    - enhance self-reliance without compromising worker participation?

13. Should Ministerial approval and orders continue to be required for multi-workplace JHSCs? Could the factors that the Minister is currently required to consider, in section 9(5) of the Act, form the basis for the workplace parties to establish such committees, without government involvement?

14. How should requirements respecting joint health and safety committees and certified members be applied in the temporary help industry?

15. Do the right to know and the right to participate need to be modified in a legislative framework that is intended to promote the IRS and encourage self-reliance of workplace parties in reducing injuries and illness?

16. What changes, if any, are required to

- make the right to refuse provisions easier to understand and apply;
- ensure the right to refuse plays an effective role in the IRS; and
- ensure the right to refuse is used responsibly by the workplace parties to prevent injuries and illness?

17. What changes, if any, should be made to the joint right to stop dangerous work and the unilateral right to stop dangerous work?

C. Application and Scope of the Act

18. What are stakeholders' general concerns with the definitions in the Act?

19. Should the definition of "worker" be changed so that coverage under the Act does not hinge on monetary compensation?

20. Should employers be responsible under the Act for the health and safety of volunteers and students (and other persons) working on their premises?

21. If covered by the Act, are there certain provisions that should not apply to volunteers or students, for example, exemption from being counted as a worker for the purposes of establishing a JHSC?

22. Are changes to the Act required to clarify the respective responsibilities of employers and contractors?

23. How can the definitions of "construction" and "industrial establishment" be changed to make it easier to distinguish between a construction project and a routine maintenance operation in an industrial establishment?

24. Are there certain types of work or workers that should be included under the Act when the work is performed in a private home?

25. How should the Act address the issue of accommodating an employee's religious beliefs when the accommodation may result in a contravention of the Act or health and safety regulations?

26. Should sexual harassment in the workplace be specifically included as a health and safety matter in the Act?

D. Enforcement of the Act

27. What role and function would stakeholders assign to the Ministry and its inspectors, taking into account the Ministry's primary activities of setting, communicating and enforcing standards?

28. Does the current appeal procedure need to be revised and if so, how?

29. Are current maximum fine levels, for individuals and corporations, appropriate?

30. How can the reprisal provision be modified to improve its effectiveness and to make workplace parties more accountable for their actions?

E. Miscellaneous Issues

31. Should requirements respecting the notification of new substances (section 34) be repealed?

REVIEW OF THE OCCUPATIONAL HEALTH AND SAFETY ACT

I INTRODUCTION

A. Purpose of the Review

The review of occupational health and safety legislation is driven by the government's overall vision for health and safety:

- a co-ordinated health and safety system where the Ministry, its agencies and the employers and employees of Ontario all work together toward a common goal: to create among the safest workplaces in the world.

The review is governed by

- a focus on the prevention of injury and illness;
- an approach to reform that is consistent with the Ministry of Labour's role of setting, communicating and enforcing standards;
- the intention to create legislation that is clear, easy to use and relevant to today's workplace;
- a desire to listen to and consult with the employees and employers of Ontario in order to make appropriate changes to the legislation.

B. Elements of the Paper

The purpose of this paper is to invite discussion on the review of the Occupational Health and Safety Act.

The paper outlines the principles and objectives of the review, makes the argument for reform, and provides background information on the existing legislation.

Specific review issues, on which input is sought, are presented in detail. Some issues have been prompted by the government's vision for the future. Some have come up in informal discussions with stakeholders. Other issues have arisen from the experiences of Ministry of Labour staff who work with the legislation.

The paper provides some questions to help focus discussion and feedback. These questions are not intended to limit input or debate in any way.

The paper explains how to participate in the discussion.

C. Guiding Principles of the Review

Our review of the Occupational Health and Safety Act is guided by four key principles: prevention, workplace partnership, effective enforcement and economic growth. These principles are the building blocks of a new system that will seek to substantially reduce workplace injury and illness.

1) Prevention of Workplace Injury and Illness

Workplace health and safety are essential to individual well-being and welfare and to harmonious, productive workplaces. An effective framework for occupational health and safety will be measured by the extent to which it helps to reduce workplace injury and illness.

A system that strives to create healthy and safe workplaces helps to assure employees that their contribution and productivity are valued.

The health and safety legislation should give employees and employers the tools they need to carry out front-line responsibility for eliminating workplace hazards and achieving optimum health and safety performance.

The return on investment in safety, by both the employer and employee, can be measured in higher productivity, improved morale, reductions in time lost, lower workers' compensation premiums, and an overall environment that contributes to more harmonious relations among everyone in the workplace.

2) Workplace Partnership

To achieve its goal of significantly improved health and safety records, the Occupational Health and Safety Act should support a partnership between the workplace parties.

The legislation should encourage self-reliant workplaces--where employees and employers share responsibility for prevention of injury, high health and safety standards and good workplace practices.

This approach would require greater cooperation between employers and employees as workplace partners.

3) Effective Enforcement

The Ministry of Labour is committed to working with everyone in the workplace to ensure that there is compliance with health and safety standards.

The Ministry will seek to develop standards that effectively reduce workplace hazards and ensure that the workplace parties understand their respective responsibilities under the Act.

Ministry resources will focus on employers with poor health and safety programs and performance.

4) Economic Growth

In addition to the personal losses resulting from workplace injuries and illness, there are significant consequences for the overall economy.

Ontario's competitive advantage in North America is closely linked to the effectiveness of its occupational health and safety system. Competitiveness and safety excellence are complementary and mutually reinforcing goals.

It is critical to see the Occupational Health and Safety Act as a key element in securing continued prosperity for Ontario.

Workplaces that are safe and healthy are productive and competitive. They are able to contribute to job creation and economic growth.

D. Specific Objectives of the Review

The present review of the Act has a number of objectives:

1) **to clearly establish and maintain the internal responsibility system as the foundation for Ontario's approach to occupational health and safety.**

   Many stakeholders are familiar with the term "internal responsibility system" (IRS) whereby employers and employees have the primary responsibility for workplace health and safety. Several provisions in the Act support this principle. The review is intended to strengthen these provisions and create new ones where necessary.

2) **to design legislation that is flexible in terms of how compliance is achieved and maintained.**

The legislation would continue to set essential standards, but permit the workplace parties to exercise greater discretion on how standards are met.

3) **to streamline the Act by eliminating red tape and any overlap and duplication with other legislation, both provincial and federal.**

4) **to make the Act easier to understand and apply.**

II THE NEED FOR REFORM

A. New Directions for the Ministry of Labour

In order to create an environment that encourages investment and job creation, the government is re-thinking delivery of programs and services to the people of Ontario. The goal is to eradicate duplication and inefficiency and to create measurable and positive results.

The role of the Ministry has been redefined: to set, communicate and enforce appropriate workplace standards. The Ministry is now reviewing all relevant legislation and bringing practices up-to-date. The Ministry has begun to make changes designed to help rebuild confidence in Ontario's prospects for economic growth and job creation.

The existing legislative framework for occupational health and safety stresses process and procedure rather than outcomes. It emphasizes government involvement and does not adequately recognize responsibility and accountability of the workplace parties. There are few incentives for employers and employees to strive for excellent health and safety performance.

Fundamental changes in direction and focus are needed if the legislation is to be effective in achieving improvements in the health and safety record of the province.

The first steps in achieving these changes have already been taken.

In March 1996, the Minister of Labour announced significant reforms to Ontario's occupational health and safety system. The reforms were based on the recommendations of the Workplace Health and Safety Review Panel, established by the Minister to examine the occupational health and safety system in Ontario.

The panel's recommendations were implemented in five key areas:

- First, the mandate of the Workers' Compensation Board (WCB) was expanded to include responsibility for prevention of injury and illness and the promotion of health and safety.

- Second, the Minister asked senior officials of the Ministry and the WCB to work with stakeholders to identify priorities for health and safety and to develop a performance measurement and monitoring system that would indicate whether the goal of preventing injuries and illnesses is being achieved.

- Third, a task force was set up to examine and review the health and safety delivery organizations, including the occupational health clinics. The recommendations of this task force have been incorporated into proposed workers' compensation legislation.

- Fourth, the Minister announced that certification training will remain as an integral component of Ontario's occupational health and safety system, as will joint health and safety committees. As part of its new mandate, the WCB will set province-wide training standards and approve training programs and providers that meet these standards. This will allow for flexibility in achieving certification outcomes by making a variety of programs and delivery methods available to meet the needs of different workplaces.

- Lastly, the Minister announced the government's commitment to increased investment in occupational health and safety research to find new ways of preventing injuries and illness and reducing compensation costs.

In November 1996, the Minister of Labour introduced new workers' compensation legislation, Bill 99, the Workplace Safety and Insurance Act, 1996. The proposed legislation, which does not take effect until approved by the Legislature, would firmly entrench the goal of prevention of injury and illness as a key priority of the WCB, renamed as the *Workplace Safety and Insurance Board.*

With this review of the Occupational Health and Safety Act, the Minister is building on the reforms already undertaken. We are also shifting our priorities in occupational health and safety towards setting, communicating and enforcing standards. At the same time, it is creating legislation to encourage greater self-reliance among employers, employees and employee representatives. This will allow the Ministry to concentrate more of its resources on those workplaces that need to become self-reliant.

B. The Changing Nature of Work and the Workplace

Ontario's workplaces and the way work is performed are changing in fundamental ways that have implications for occupational health and safety. A legislative framework that is responsive to the nature and the pace of these changes is needed.

Workplaces today are much more varied in terms of size and forms of employment than ever. Employment is shifting to the service sector, away from traditional manufacturing jobs. There are fewer traditional employer/employee relationships as more people either become self-employed or work on contract for one or more employers.

The way in which the Act applies to these new employment arrangements varies. As more non-traditional employment arrangements arise, the suitability of the current provisions of the Act should be reviewed.

The once standard eight-hour day and forty-hour week are becoming less common. Increasing numbers of workers are employed as contingent staff or on a temporary or part-time basis. This makes it harder to maintain proper awareness of and adherence to health and safety standards.

Other factors potentially affecting health and safety in the workplace are global competition and rapid technological advances. All create significant and different challenges for employers and employees. The workplace parties must be able to work co-operatively to meet these challenges without compromising health and safety.

C. Workplace Injuries and Illnesses

The intention of workplace health and safety reform is to substantially reduce the current levels of employment-related injury, illness and death in Ontario workplaces. Although the numbers and rates of workplace injuries and fatalities are considerably lower than the levels a few years ago, they are still too high:

- In 1995, there were about 118,800 serious workplace injuries and about 253 deaths were compensated by the WCB as being work related.

- The WCB has paid over $2.3 billion in benefits to injured workers in each of the past several years, money that has been collected from employers in the form of assessments.

- More than six million work days are estimated to have been lost in each of the past several years because of workplace injuries, many of which also result in severe and permanent disability.

These statistics do not convey the toll of personal suffering upon the victims and their families and the impact on the quality of their working and family lives. The goal of this government is to make Ontario workplaces among the safest in the world. Achieving this goal will reduce human suffering and enable the province's businesses to be more competitive and contribute to job creation and economic growth.

III BACKGROUND

A. The Occupational Health and Safety Act

The Occupational Health and Safety Act came into force on October 1, 1979. The Act provides the basic framework for making Ontario's workplaces safe and healthy.

The Act:

- fosters the internal responsibility system in several ways: by requiring a joint health and safety committee or a worker health and safety representative; by requiring employers to have a health and safety policy and program; and by making officers of a corporation directly responsible for health and safety;

- imposes both general and specific duties on the workplace parties to protect health and safety;

- gives workers four basic rights - the right to know and receive training about potential hazards; the right to participate in resolving health and safety concerns; the right to refuse unsafe work; and, in certain cases, the right to stop work;

- sets out penalties for contraventions and provides inspectors with broad powers to inspect workplaces, investigate accidents and complaints, and issue orders for compliance.

B. Workers' Compensation Reform

In the past, occupational health and safety has been considered separate and apart from compensation for workplace injuries and illness. But they are clearly just different sides of the same coin.

The relationship between the prevention function of occupational health and safety on the one hand and the return to work/income maintenance function of workers' compensation on the other is clear. Improved accident prevention and greater awareness of sound health and safety practices will result in fewer claims being filed through the workers' compensation system.

The proposed workers' compensation legislation, Bill 99, the Workplace Safety and Insurance Act, 1996 is based on many of the same principles that shape the review of occupational health and safety legislation. The emphasis is on prevention of illness and injury and self-reliant workplaces.

The government is proposing a new perspective and relationship regarding the Occupational Health and Safety Act and the newly tabled Workplace Safety and Insurance Act, 1996. It is expected that the future would be characterized by substantial harmonization and co-ordination of policy and program development, as is being done in other provinces.

IV ISSUES FOR DISCUSSION

A number of issues for discussion have emerged as a result of the government's reform agenda; the new directions of the Ministry and the Workers' Compensation Board; and the current status of the Occupational Health and Safety Act.

The remainder of this paper presents these issues and poses questions broadly related to enhancing the flexibility of the Act, encouraging self-reliance of the workplace parties, and to the application, scope and enforcement of the Act.

A. Enhancing Flexibility

i) A Performance-Based Framework for OHS Legislation

In Ontario, developing flexible legislation is a government priority. To that end, the government is reviewing all statutes and regulations with a view to removing prescriptive requirements, red tape and other barriers to compliance.

Health and safety legislation should encourage employers, employees and employee representatives to create a workplace environment for excellence - one in which there is a demonstrated, mutual commitment to, competence in, and accountability for, health and safety on the part of all the workplace parties. Such an environment will inevitably lead to fewer workplace injuries and illnesses.

Health and safety legislation that is inflexible and highly prescriptive is recognized as a barrier to compliance in many workplaces. Prescriptive legislation sets out detailed instructions for compliance, leaving little room for discretion, even if the same or better results could be achieved another way. The focus tends to be on the process and not the outcome.

In contrast, performance-based legislation sets out the objectives or goals to be achieved rather than the steps to be followed. The employer has the freedom to tailor a compliance strategy to a specific workplace. In so doing, creative and innovative mechanisms can be used to address the issues of highest priority within the individual workplace.

Several jurisdictions, most notably the United Kingdom, the European Union, the United States and Australia are adopting a performance-based approach to legislative development.

In Canada, Saskatchewan, Alberta, Newfoundland and Manitoba are examining ways of introducing performance-based legislation.

The Act

To a large extent the Act is performance-based, setting out general principles while most detailed requirements are contained in the regulations; however, there are some sections of the Act that tend to be quite prescriptive. In particular, the provisions respecting worker representatives, joint committees and work refusals are highly process-oriented. These sections of the Act are discussed later in the paper.

Question 1:

Are there sections of the Act where specifications and procedures could be amended or replaced with performance-based objectives and where red tape could be eliminated?

Health and Safety Regulations

Many regulations exist under the Occupational Health and Safety Act. In the future, we anticipate conducting a review of these regulations, with a view to simplifying and streamlining requirements, by moving to a format that is performance-based rather than prescriptive.

Such performance-based regulations would set out general objectives or goals and would be accompanied by codes of practice that set out detailed, practical direction and guidance on how to achieve the prescribed objective or goal.

Codes of practice can provide useful information to the workplace parties, and can strengthen the Ministry's ability to enforce performance-based legislation. Orders could be written on the basis of an employer's performance, using the applicable code of practice as a benchmark. It is anticipated that codes of practice would be developed by the Ministry of Labour and industry sectors, to meet the specific needs of each sector. Some experience in this regard already exists. For example, sector-specific health and safety guidelines or "best practices" have been developed and are being applied in the film and television industry.

In anticipation of the upcoming review of health and safety regulations, the government is taking this opportunity to seek input from interested parties on the proposed shift to performance-based regulations.

Question 2:

What are your views on the Ministry of Labour's proposed shift to the development of performance-based health and safety regulations?

ii) Recognizing Exceptional Performers

The government wants to examine ways to recognize, and reward workplaces with exceptional health and safety track records and demonstrated excellence in health and safety management. The intention is to support voluntary initiatives and encourage employers to excel in their own workplace health and safety management.

Eligible workplaces would be given greater flexibility in the management of workplace health and safety and the design of their health and safety programs. Examples of areas where greater latitude could be given to selected workplaces include:

- greater flexibility in the structure and functioning of joint committees;
- improved models for worker participation in health and safety;
- greater control in the design and delivery of health and safety training programs.

To link good health and safety management on one hand to prevention and compensation on the other, some thought could be given to providing employers with additional incentives such as enhanced refunds on workers' compensation premiums. The WCB already has programs in place to rate an employer's health and safety experience and provide for either refunds or surcharges.

Question 3:

What are your suggestions concerning approaches to recognizing exceptional performers? Specifically, comments are being sought on:

- *the criteria to evaluate an employer's health and safety performance;*
- *aspects of workplace health and safety management that can be assumed by "exceptional" workplaces with minimal government intervention; and,*
- *how financial incentive programs could be developed or modified and applied.*

iii) Small Business

The small business sector makes up a very significant proportion of Ontario businesses. The province has about 260,000 firms that have fewer than 50 employees. They account for fully one third of private sector employment. Statistics show that in 1993, 96.3% of all Ontario workplaces with paid workers had fewer than 50 workers, and about 72% had fewer than five employees.

Firms with Paid Employees by Size of Firm

Ontario - 1993

Number of Employees	% of Firms
Under 5	72.3%
5 - 19	18.9%
20 - 49	5.1%
50 - 499	3.3%
500 +	0.4%

Small businesses are an important source of new jobs and growth in Ontario. Data indicate that while medium and large businesses reported heavy job losses in recent years, small businesses, especially firms employing fewer than five workers, showed job growth. The small business share of total employment has been rising over time. On a full-time equivalent basis, as noted, small businesses account for 33 per cent of private sector employment, up from 29 per cent in 1980. The contribution of small businesses to job creation must be recognized. During the 1980's expansion, firms with fewer than 50 employees created 850,000 net new jobs in Ontario - an average of 121,400 jobs per year. The potential of small business has been demonstrated. Renewing the dynamism of this sector is critical for Ontario's long-term economic prospects.

Small businesses are diverse - they cross all industrial sectors and vary in nature from small owner-operated shops to somewhat larger, capital intensive companies, employing a number of workers, where the owner/manager may or may not work on site. Employees, like owners, often perform multiple and diverse tasks and because many small businesses engage in work at multiple sites, that may belong to a customer, employees often work alone or in very small groups with little supervision.

There appears to be support for strengthening the internal responsibility system as a means of improving the health and safety performance of the small business sector. Suggested ways of accomplishing this include: raising awareness of health and safety issues, (workplace specific as well as generally); increased education and training; greater access to support services, and effective enforcement of the Act and regulations.

While employee involvement is recognized as being key to economic success, joint committees, as a mechanism for worker participation, tend to be viewed by the small business community as rigid, bureaucratic structures that limit flexibility and make workplace communications too formal.

Question 4:

How can the Act and its administration be made more responsive to the needs of small business? In particular, how can

- *the Internal Responsibility System be effectively implemented in small workplaces; and*
- *the requirements for health and safety representatives and joint committees be made more suitable to small businesses?*

B. Enhancing Self-Reliance

i) The Internal Responsibility System

A stated objective of this review is to clearly establish the internal responsibility system as the foundation for Ontario's approach to occupational health and safety. The Act, by assigning specific duties to the employer and worker, and by granting certain rights to the worker, places the primary responsibility for health and safety directly on those in the workplace.

The IRS should not be centred on the existence and work of joint committees. It should be part of the culture of workplaces. All persons in a workplace, from the CEO and senior management ranks to all levels of workers, are included in the IRS and all persons have to work cooperatively to make the IRS function effectively.

The IRS is not articulated anywhere in the legislation. There is no definition of the term and the Act does not have an interpretive preamble that explains the IRS. Consequently, the philosophy of the IRS has to be derived from the Act's structure and the accepted administrative and enforcement policies and practices of the Ministry.

This can result in different interpretations of the IRS being held by various affected parties, which in turn, can lead to confusion regarding roles, responsibilities and rights of workplace

parties. Rather than working together to eliminate injuries and illness, employers and employees may end up debating who can do what and when under the Act and relying too much on the Ministry to resolve disagreements and to identify workplace hazards.

The dialogue associated with this review is intended to lead to reforms of the Act that encourage employers and employees to become more self-reliant. The IRS is intended to be the major vehicle by which this self-reliance can be achieved. Accordingly, the Ministry believes it is essential that the IRS and its elements be clearly explained and the obligations of each affected workplace party within the IRS be articulated, to ensure everyone has the same understanding of the IRS.

Question 5:

Should an explanation of the IRS:

- *be set out in a Ministry policy document available to the public and stakeholders?*
- *be included in an interpretive preamble to the Act?*
- *be included within the Act (e.g. in a purpose clause)?*
- *remain a general concept open to interpretation by workplace parties to meet their particular needs and circumstances?*

By having an explanation of the IRS in the Act, everyone in the workplace could be held accountable for not fulfilling their obligations, or for obstructing the effective functioning of the IRS.

Question 6:

What would you consider to be the elements of an IRS that would lead to safe and healthy workplaces and ensure compliance with the Act?

Health and Safety Policy and Program

Management's commitment to health and safety is embodied in the health and safety policy of a workplace and forms the foundation of the workplace's IRS. The policy is management's mission statement respecting workplace health and safety. That is why the Act currently requires an employer to prepare and post a copy of the company's occupational health and safety policy and to develop and maintain a program to implement that policy (section 25(2)(j)).

The Act, however, does not provide guidance as to what should be included in the policy or its program. This, according to some stakeholders, reduces the usefulness of the provision in establishing and maintaining an effective IRS at a workplace.

Question 7:

How can the requirement for a health and safety policy and implementation program be modified so that the policy and program can be used more effectively to strengthen the IRS in the workplace?

The way in which the requirements for a health and safety policy and program apply to construction projects is under review. Currently, employers with five or fewer employees are not required to have a health and safety policy or program (section 25(4)). On construction projects, which typically contract with many different employers, there are many small contractors who, by virtue of their size, are not required to have health and safety policies or programs. In addition, a constructor is not required to have a health and safety policy and program for the project as a whole. The Act defines a "constructor" as "a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer". There is room for better coordination of health and safety among employers on a construction project.

Question 8:

Should a constructor be required to have a health and safety policy and program for the whole construction project?

ii) Purpose Clause

A purpose clause sets out the objectives of an act. It guides officials and adjudicators who administer and interpret the law.

The Occupational Health and Safety Act does not have a purpose clause. The Ministry is considering proposing one to make the underlying objectives of the Act more explicit, and to ensure that the statute reflects the government's policy priorities.

The federal jurisdiction and three provinces - Manitoba, Quebec and Prince Edward Island, have purpose clauses in their occupational health and safety statutes. Manitoba's Workplace Safety And Health Act has the broadest clause by far. It refers not only to protecting workers and the self-employed from risks to their safety, health and welfare, but also to protecting "other persons" from risks associated with workplace activities. Manitoba's act also includes the promotion and maintenance of the highest degree of physical, mental and social well-being of workers in its purpose clause.

The purpose of Quebec's act is the elimination, at the source, of dangers to the health, safety and physical well-being of workers.

Prince Edward Island's Occupational Health and Safety Act states that its purpose is to secure employees and the self-employed from risks to their safety, health and physical well-being that are related to activities in their workplaces.

The Canada Labour Code refers specifically to preventing accidents and injury to health that are related to employment.

Question 9:

Should a purpose clause be added to the Act, and if so, what objectives should be included in it?

iii) Duties of the Workplace Parties

An important principle of the IRS is that each individual in a workplace, to the extent of that person's authority and ability, has a personal responsibility for making that workplace safe and for preventing injuries and illness. The Act must clearly identify the nature and extent of those responsibilities for all the workplace parties.

Their duties must interconnect, provide for joint participation, and create internal checks and balances, resulting in a higher degree of internal identification and control of workplace hazards.

The Ministry is considering whether the current duties listed for the various workplace parties (constructor, licensee, employer, supervisor, worker, owner, director and corporate officer, supplier of equipment, engineer and architect) are too specific and inflexible.

For instance, the existing employers' duties, which mandate 33 specific functions, could be too prescriptive and not sufficiently focused on health and safety outcomes.

In view of the changing nature of workplaces, the question arises as to how the current duties apply in workplaces where the traditional relationship and separation between employers, supervisors and employees have blurred, for example, in workplaces with self-directed teams, where managerial or supervisory duties are shared by the workers themselves.

Duties respecting an injured worker returning to work should also be considered. The WCB is now a more active player in health and safety, since its mandate was modified to include the prevention of occupational injuries and illness and the promotion of health and safety. A key strategy of the WCB in reducing accident costs will be new return-to-work responsibilities for workers and employers. To facilitate the return-to-work process, there will be more integration of the activities of Ministry inspectors and Board rehabilitation staff.

Question 10:

What duties and responsibilities should be assigned to the various workplace parties, taking into account,

- *the changing nature of work;*
- *the appropriate level of accountability for health and safety?*

Other Parties

As the Ministry streamlines its operations and focuses on its new role of setting, communicating and enforcing standards, opportunities will arise for others to provide services to the workplace parties to support health and safety programs and to assist in compliance with legislative and regulatory requirements. Worker training, industrial hygiene monitoring and sampling, review of workplace drawings or plans, ergonomic assessments, hazard audits, etc. are several examples of health and safety services that employers may need for maintaining safe workplaces.

Question 11:

Should other parties, whose services are essential to the maintenance of workplace health and safety, be covered by the Act and have appropriate obligations assigned to them?

iv) Joint Health and Safety Committees

Joint health and safety committees (JHSCs) provide a process for worker participation and for consultation between employers and employees. The value of health and safety committees in the workplace is widely accepted. Various studies have shown that JHSCs make workers and managers more aware of health and safety, and help to prevent and reduce injuries, illnesses and deaths in the workplace.

The Ministry is committed to the principle of workplace joint health and safety committees. At the same time, many of the related provisions respecting the structure, function and role of a committee are very rigid. There are, for example,

- minimum requirements for committees depending on the size of the workforce;
- specific rules for the composition of a committee and for the selection of committee members;

- requirements to meet at least once every three months and to keep detailed minutes of meetings for examination and review by Ministry of Labour inspectors;

- requirements to conduct physical inspections of the workplace or parts of the workplace monthly;

- requirements to post the names and work locations of committee members.

There are similar requirements concerning the composition and function of worker trades committees in the construction sector.

Question 12:

How can the requirements respecting joint health and safety committees (and worker representatives) be changed to

- *increase the effectiveness of committees and representatives;*
- *give the workplace parties more flexibility; and*
- *enhance self-reliance without compromising worker participation?*

Multi-Workplace JHSCs

A multi-workplace JHSC is a committee established for more than one workplace or parts thereof; these are usually geographically separate workplaces under the ownership and control of one employer. To be recognized as an acceptable arrangement under the Act, a multi-workplace committee must be approved by an order of the Minister, issued under section 9(3.1) of the Act. In issuing such an order, the factors to be considered by the Minister are outlined in section 9(5) of the Act. This is a variation from section 9(2) of the Act, which requires the formation of a separate JHSC for each workplace.

An example of a multi-workplace committee would be one established by a municipal government to cover a number of parks or recreational facilities. Another example is a JHSC for workers belonging to the same union but working in separate workplaces for the same employer, such as unionized non-teaching staff in schools within the same school board.

In view of the Minister's wish to encourage self-reliance of everyone in the workplace, the issue arises as to whether Ministerial approval should be required for private, voluntary arrangements worked out by the workplace parties.

Question 13:

Should Ministerial approval and orders continue to be required for multi-workplace JHSCs? Could the factors that the Minister is currently required to consider, in section 9(5) of the Act, form the basis for those in the workplace to establish such committees, without government involvement?

Temporary Help Industry

It is not clear how the requirements to establish a joint committee with certified members should be applied in the temporary help service industry. The Act requires a committee at a workplace where 20 or more workers are "regularly employed". Temporary help agencies supply workers ("temps") on contract to other employers' workplaces. These agencies often have a small staff at the agency office but a large list of temporary workers who are seeking placements with other employers. When placed, they work at another workplace but are paid by the agency. These temporary workers may, on occasion, attend the agency office to pick up assignments or for personnel matters.

Because temporary help workers are associated with two employers and workplaces (the agency and the client's workplace), it is not clear where the worker should be considered to be "regularly employed" and therefore included in the count for establishing a committee.

Question 14:

How should requirements respecting joint health and safety committees and certified members be applied in the temporary help industry?

v) Workers' Rights

The Act gives workers four basic rights: the right to know about any potential hazards to which they may be exposed; the right to participate in identifying and resolving health and safety concerns; the right to refuse work they believe is dangerous to either their own health and safety or that of another worker; and, in certain circumstances, members of a JHSC who are "certified" have the right to stop work that is dangerous.

The Right to Know and Participate

The extent to which workers are able to effectively participate in identifying and resolving health and safety concerns depends directly on how well-informed they are about workplace hazards.

The Act has various provisions requiring information to be given to workers and to their representatives on a JHSC or trade union - a report and any related results respecting health and safety or industrial hygiene testing, accident reports, annual WCB data, material safety data sheets for hazardous substances, etc. Such information can guide workers in assessing workplace hazards and developing solutions to health and safety issues.

Being properly informed about potential hazards enables a worker to individually take appropriate precautions and to raise health and safety concerns with the supervisor, employer or JHSC. An IRS is effective only if all workers, not just the JHSC and its worker representatives, are educated and informed regarding health and safety.

Question 15:

Do these rights need to be modified in a legislative framework that is intended to promote the IRS and encourage self-reliance of workplace parties in reducing injuries and illness?

The Right to Refuse Unsafe Work

A worker's statutory right to refuse unsafe work, without fear of reprisal from the employer, has been in the Act since 1979. Under section 43, a worker may refuse to perform work where he/she has reason to believe that the physical condition of the workplace or any equipment or material he/she is to use or operate is likely to endanger himself/herself or another worker. Similarly, a replacement worker assigned to perform the refused work has the same right to refuse.

The occupational health and safety legislation of all provinces, the federal government and the territories provides for the right of workers to refuse unsafe work. In some jurisdictions, it is the duty of a worker not to work where there exists danger to himself/herself or another worker.

All jurisdictions have a similar two-stage work refusal procedure in which a worker can continue to refuse to work at the second stage following an internal investigation, pending the investigation and decision by a government health and safety inspector. All jurisdictions prohibit the reassignment of refused work unless the replacement worker has been advised of the refusal and the reasons for it.

Ontario provides for a subjective test (reason to believe) at the first-stage investigation to determine if the refusal is justified and then an objective test (reasonable grounds to believe) at the second stage. The other jurisdictions provide for an objective test at both stages of the investigation.

Alberta and Newfoundland relate the right to refuse to situations of "imminent danger". Alberta defines "imminent danger" as a danger which is not normal for that occupation or under which a person in that occupation would not normally carry out his/her work.

Approximately 93% of all work refusal investigations occur in the industrial sector, with the remainder occurring in construction and mining. Data indicate that Ministry work refusal investigations occur most frequently in larger workplaces (more than 100 workers) in industrial, highly unionized sectors, such as Automotive (26%), Manufacturing (26%), Corrections (10%), Service/Retail (12%), and Petrochemical (6%).

Employer Concerns

Employers are concerned that the work refusal provision is sometimes misused to resolve potential labour relations issues, such as work reorganization, technology changes and overtime, as well as for non-immediate health and safety concerns which could be dealt with through an internal complaints procedure.

Work refusals have a particularly significant impact on workplaces with continuous/assembly line production and just-in-time production systems and on workplaces processing perishable goods. According to industry stakeholders, work refusals can cost companies tens of millions of dollars in lost production.

Employers also maintain that having the subjective criterion of "reason to believe" can lead to unsubstantiated work refusals and unnecessary, costly production stoppages, with no associated penalties for workers.

Finally, concerns have been raised about the "susceptible worker" policy currently applied by Ministry of Labour staff. Inspectors investigating work refusals base their decisions on the individual refusing worker's unique physical or medical condition, not on the capabilities of a so-called "average" worker. This means that situations arise where an inspector can render a decision that workplace conditions are likely to endanger a particular worker, without there being any contravention of the Act or regulations. Employers would like inspectors investigating work refusals to base their decisions on the average worker.

Employee Concerns

Employee representatives maintain that in some cases, work refusals arise because supervisors and employers do not otherwise respond to workers' health and safety complaints. This is of particular concern regarding ergonomic hazards and exposures to hazardous chemicals which can lead to serious injuries that are not necessarily immediate or obvious.

Employees are also concerned that supervisors/employers often do not follow the procedure outlined in the Act for investigating work refusals, in order to minimize the loss of production. According to worker representatives, some supervisors/employers perform a minimal first stage investigation in order to proceed as quickly as possible to the second stage, at which point they can call for a Ministry inspector and try to replace the refusing worker in order to resume production.

Administrative Concerns

Employees in certain occupations responsible for public safety (eg. fire fighters, police, correctional officers, health care workers) have a restricted right to refuse work, that is, they cannot refuse unsafe work if the alleged danger is considered to be an inherent or normal part of the job or if the refusal would endanger the life, health or safety of another person.

Situations have arisen where management and employees differed in their interpretation of what kind of unsafe work fell into this restriction and whether certain employees were entitled to refuse to do the work they alleged to be unsafe. This difference of opinion has particularly intensified in the last few years in the correctional facilities, which have experienced a significant increase in the number of work refusals and subsequent appeals of inspectors' decisions.

There have also been disagreements between the workplace parties about which kind of hazard or work falls within the parameters of the work refusal provision. For example, should workplace violence or moving/lifting heavy patients be covered? Some stakeholders suggest that the work refusal provisions should apply to any workplace hazard that is covered under the Act rather than just the more specific items referred to in section 43 - machine, equipment, device, etc. This would avoid potential gaps in the application of the work refusal provisions. Other Canadian jurisdictions, in their work refusal provisions, broadly refer to any work or act a worker is to do which can endanger a worker.

The government is committed to retaining the worker's right to refuse unsafe work and considers it to be an essential element of the IRS.

Question 16:

What changes, if any, are required to

- *make the right to refuse provisions easier to understand and apply;*
- *ensure the right to refuse plays an effective role in the IRS; and*
- *ensure the right to refuse is used responsibly by the workplace parties to prevent injuries and illness?*

The Right to Stop Unsafe Work

The Act gives certified members of a JHSC the right to jointly direct the employer to stop work when both worker and management representatives agree that dangerous circumstances exist in a workplace. An employer is obligated to stop the work as directed and to take steps to remedy the dangerous circumstances. When first introduced, this bilateral work stoppage procedure was seen as promoting cooperation and partnership between the workplace parties in addressing health and safety issues without involving Ministry inspectors.

The Act also gives the right to an individual certified member, in special cases, to unilaterally stop work in dangerous circumstances. If any certified member in the workplace has reason to believe that the joint right to stop work will not be sufficient to protect the workers from serious risk to their health or safety, he/she may apply to an adjudicator for a declaration against the employer.

If the adjudicator, guided by criteria prescribed in Ontario Regulation 243/95, agrees with the certified member's contention, the adjudicator may declare the employer subject to the procedure for unilateral work stoppage of dangerous work for a specified period of time. The adjudicator may also recommend to the Minister that an inspector be assigned, for a specified period, to oversee the health and safety practices of the employer.

Employee representatives have argued that the unilateral right to stop dangerous work is a necessary emergency tool in those workplaces where the IRS is not functioning, where there is immediate danger to workers and where there is a demonstrated lack of commitment by the employer to sound health and safety practices, as determined by an impartial government official.

Some employers consider this right to be unnecessary, because workers already have the individual right to refuse unsafe work. Others consider the unilateral right of a worker certified member to stop work as an encroachment on management's authority and responsibility for the safe and productive operation of a business.

To date, the unilateral right to stop work has not been exercised. Six applications for a declaration by the Office of Adjudication have been received, of which five were resolved through mediation by Ministry staff prior to an adjudication hearing. One application is still in progress, with an adjudication hearing expected in 1997.

Question 17:

What changes, if any, should be made to the joint right to stop dangerous work and the unilateral right to stop dangerous work?

C. Application and Scope of the OHS Act

This section of the review paper raises issues related to the application and scope of the Act - the extent to which various individuals and workplaces are covered.

i) Definitions

The definitions of terms used in law should be as clear as possible in order to minimize confusion, doubt and disputes relating to the interpretation and enforcement of legislated requirements.

Question 18:

What are stakeholders' general concerns with the definitions in the Act?

Outlined below are a few terms whose definitions have already raised concerns and require review.

a) "worker"

The Act applies to persons who are "workers". The Act defines a "worker" as a "... person who performs work or supplies services for monetary compensation...". Consequently, whether the Act applies to a person working in a workplace turns upon whether that person is paid. Ministry of Labour staff have taken the position that any payment, no matter how small, is sufficient to bring a person under the Act.

The current definition of "worker" has raised particular concerns respecting students and volunteers in a workplace. For example, the Act does not apply to students while they are in the classroom. Under co-op education programs, however, students are typically placed with a company or business to receive practical, on-the-job experience and training to supplement their school studies. The students actively participate in a placement company's day-to-day operations, often using the same materials and equipment as the company's regular workers, and being exposed to the same possible health and safety hazards.

If students receive any kind of payment from the placement employer, or any kind of expense allowance from the co-op program such as money to cover transportation costs or meals, they meet the definition of "worker" and are covered by the Act. If no payment is received, there is no entitlement to health and safety protection under the Act and no obligation on the placement employer.

The issues with respect to volunteers in a workplace are much the same. For example, volunteer fire fighters who typically receive an honorarium (which is considered a voluntary payment for services rendered) are considered by Ministry staff to be workers under the Act

and entitled to receive health and safety protection. (Some municipal governments do not share this view.) There may be other types of volunteer workers, in hospitals for example, who receive no compensation and are therefore not covered by the Act.

The definition of "worker" in other jurisdictions is fairly broad. For example, Quebec defines a "worker" as a person, including a student as determined by regulation, who, under a contract or apprenticeship program, even without remuneration, carries out work for an employer. Alberta simply defines a "worker" as a person engaged in an occupation.

Question 19:

Should the definition of "worker" be changed so that coverage under the Act does not hinge on monetary compensation?

Question 20:

Should employers be responsible under the Act for the health and safety of volunteers and students (and other persons) working on their premises?

Question 21:

If covered by the Act, are there certain provisions that should not apply to volunteers or students, for example, exemption from being counted as a worker for the purposes of establishing a JHSC?

Note: The Minister of Labour has already responded to concerns about students by embarking on a Young Worker Awareness Program, in co-operation with the Workers' Compensation Board, the Industrial Accident Prevention Association and the Workers' Health and Safety Centre. The objective is to educate young students in school on the importance of health and safety on the job and on their rights as workers under the OHSA. The intention is that students will be better able to protect themselves from accidents and injuries when they join the work force.

b) "employer"

"Employer" is defined in the Act as "a person who employs one or more workers or contracts for the services of one or more workers". The definition also specifies that the term "employer" includes a "contractor or subcontractor".

The question arises, therefore, whenever a company retains an outside contractor to perform work, who is the actual employer for the purposes of the Occupational Health and Safety Act.

Question 22:

Are changes to the Act required to clarify the respective responsibilities of employers and contractors?

c) "construction"

The definition of "construction" includes structural maintenance, painting and repair. A concern has been raised that this definition makes it difficult to distinguish between a construction project and a plant shut-down or routine maintenance operation in an industrial establishment, and then to determine which of the two sector regulations (the Regulations for Industrial Establishments or the Regulations for Construction Projects) should apply in a particular case. A situation can also arise where both regulations apply in the same workplace.

Question 23:

How can the definition of "construction" or "industrial establishment" be changed to address this concern?

ii) Homework

Under existing legislation, there is inconsistent treatment of work performed in the private home. Currently, the Act does not apply to work performed in the home, by an owner or occupant, or a servant of the owner or occupant.

At the same time, the Act has a broad definition of "workplace", which permits a private home to be regarded as a workplace provided the work is performed by someone other than an owner, occupant or servant.

For various reasons, work is increasingly being performed in the private home. For example,

- Garment workers are given sewing materials and will often complete articles of clothing in their own homes, using their own machines.

- Because of health care reforms, more patients, disabled persons and senior citizens are receiving care and services in their own homes rather than in hospitals and institutions.

The Act does not apply to the work and workers described in the first example but it does apply in the second case, to the visiting home care workers.

The application of the Act to work in the home is being reviewed because of the inconsistencies in the current legislation, the growth of work at home, and the potential health and safety hazards.

Question 24:

Are there certain types of work or workers that should be included under the Act when the work is performed in a private home?

iii) Religious Accommodation

The Act has a provision stating that it prevails over other legislation. The Ontario Human Rights Code has a similar provision indicating that where another Act or regulation requires or authorizes conduct that contravenes the rights of persons under the Code, then the Code applies and prevails.

A concern has been raised over a possible conflict between legislated health and safety requirements and the right of an employee to freedom of religion under the Code. A conflict can occur, for instance on a construction site, when it is contrary to an employee's religion to wear a hard hat but it is required by health and safety regulations to do so.

Under the Code, an employer must take measures to "accommodate" an employee's religious beliefs up to a point of undue hardship on the employer, taking into consideration the cost, health and safety requirements and outside sources of funding.

It is possible that employers may be put in a situation where complying with the Code and allowing an employee not to wear a hard hat because of religious convictions could result in non-compliance with the health and safety regulations and with an employer's duties under the Act.

The Act currently applies universally to all workers in that there are no exemptions for any category of worker from compliance with any of the health and safety regulations. The purpose of the Act and its regulations is to equally protect all workers from possible health and safety hazards in the workplace. All workers have a duty to work in compliance with the OHSA and its regulations and to wear the protective devices required. All employers have a similar duty to work in compliance with the OHSA and its regulations and to ensure that workers wear the protective devices required in the workplace.

Question 25:

How should the Act address the issue of accommodating an employee's religious beliefs when the accommodation may result in a contravention of the Act or health and safety regulations?

iv) Sexual Harassment in the Workplace

Another issue with implications for the Human Rights Code is the question of whether sexual harassment in the workplace constitutes a health and safety hazard under the Occupational Health and Safety Act.

Currently, Ministry staff refer all complaints of workplace sexual harassment to the Human Rights Commission for investigation. The Human Rights Code enshrines a worker's right to freedom from sexual harassment in the workplace. Under the Code, complaints of sexual harassment can be investigated by the Commission and appropriate remedies or compensation for damages can be ordered.

Sexual harassment cases are also sometimes grieved under a collective agreement.

Recently, the question of whether workplace sexual harassment is a hazard under the Occupational Health and Safety Act has come before the Ontario Labour Relations Board (OLRB) in two notable cases. Both cases involve section 50 of the Act, which prohibits the employer from taking any reprisal against an employee for seeking enforcement of the Act.

In the first case, the OLRB declined to enquire into an employee's complaint of sexual harassment and deferred the matter to the Human Rights Commission. In so doing, the Board reasoned that the Human Rights Code deals clearly and specifically with workplace sexual harassment; it contemplates compensation for mental anguish; provides the Commission with supervisory responsibility in harassment situations; and, accordingly, the Commission is well equipped to conduct investigations and bring about settlements. The decision noted that, in contrast, the Occupational Health and Safety Act does not deal explicitly with sexual harassment in the workplace nor is it designed to properly remedy such matters.

At the time of writing, hearings in the second case were ongoing before the OLRB.

Saskatchewan is currently the only jurisdiction to specifically include "harassment" directed at a worker in its health and safety legislation.

Sexual harassment is wrong and will remain unlawful. When it occurs there must be adequate statutory mechanisms for redress.

Question 26:

Should sexual harassment in the workplace be specifically included as a health and safety matter in the Act?

D. Enforcement of the Act

i) Role of Ministry and Inspectors

The Ministry of Labour is rededicating itself to its traditional mission of advancing safe, fair and harmonious workplaces; however, the re-allocation of resources and the streamlining of its core business, while encouraging self-reliance of the workplace parties, will define the future role of the Ministry and its inspectors.

As the Ministry shifts its priorities toward setting, communicating and enforcing standards, it is maintaining the current complement of inspectors to reinforce its commitment to strong enforcement of the Act and regulations. At the same time, professional and scientific support services are being reduced and refocused to support the new priorities.

Those in the workplace will be encouraged to turn to the private sector for services that are available and more appropriately provided outside of government.

Question 27:

What role and function would stakeholders assign to the Ministry and its inspectors, taking into account the Ministry's primary activities of setting, communicating and enforcing standards?

ii) Appeals and Adjudication

The Act provides an appeal mechanism (section 61) for workplace parties who are dissatisfied with an inspector's orders. A workplace party (employer, constructor, licensee, owner, worker or trade union) who feels "aggrieved by any order made by an inspector" can appeal to an adjudicator within 14 days of the order being issued. In October, the government announced that the Office of Adjudication would be integrated into the Ontario Labour Relations Board. This integration is currently under way and should be complete shortly.

An order of an inspector includes any order or decision, including a decision not to issue an order. An appeal to the adjudicator can be made orally, in writing or by telephone. However, the adjudicator can require that, before the appeal is heard, the grounds for the appeal be presented in writing.

The adjudicator will hear and make a decision on the appeal as promptly as possible under the circumstances. The adjudicator has the power to suspend an inspector's order pending his/her decision on the appeal, to uphold or rescind the inspector's order or to issue a new order.

Various concerns have been raised regarding the appeal process. For instance, 14 days is considered by some stakeholders to be too short a time in which to determine the impact of an inspector's order and to submit an appeal. The time allowed to mount an appeal varies across jurisdictions in Canada, from three days in Manitoba, seven days in New Brunswick and Newfoundland, to 21 days in Saskatchewan and 30 days in Alberta.

There also seems to be an increasing tendency for aggrieved parties to appeal things other than an inspector's orders or decisions, such as a specific Ministry policy, the investigative actions of an inspector, the narrative sections of an inspector's report, or an inspector's determination that the work refusal provision does not apply to a particular circumstance as per section 43(1) and (2) of the Act.

There has been a significant increase in the number of appeals in the last few years. This has increased demands on inspectors and office staff and created a backlog in cases, often lengthening the time required to hear an appeal initially to six months and longer.

Elsewhere, Manitoba and New Brunswick have a simple appeal provision that permits only an appeal of an inspector's "orders", whereas Newfoundland and Alberta relate an appeal to "orders" issued under particular sections of their occupational health and safety acts.

Saskatchewan's Occupational Health and Safety Act allows an appeal of an inspector's "decision", which is broadly defined to include any determination or action of an occupational health officer that is authorized by the Act.

Question 28:

Does the current appeal procedure need to be revised and if so, how?

iii) Penalties

The Ministry is committed to strong and active enforcement of the Act. When appropriate, prosecution of offenders for violations of the Act will continue to play an essential role in keeping workplaces safe and ensuring the workplace parties fulfil their obligations.

Currently, a person who is convicted of an offence under the Act is liable to a fine of up to $25,000 or 12 months in prison, or both. A corporation, if convicted, is liable to a maximum fine of $500,000.

Concerns have been raised that the potentially high cost of penalties under the Act is a barrier to businesses in Ontario. Suggestions have also been made that a more flexible system of prosecution and penalties be considered.

Some other provinces levy higher fines for second offences under their occupational health and safety legislation, as well as having a set fine for each day during which an offence continues. For example, in Alberta, the fine for a first offence can reach $150,000; and $300,000 for a second offence. The guilty party can pay up to $10,000 for each day the first offence continues, and up to $20,000 for each day a second offence continues.

In Saskatchewan, when an offence results in a fatality or serious injury, the fine upon conviction can be a maximum of $300,000. Upon conviction for a first offence, where a serious injury was likely, the fine can reach $50,000, plus $5,000 for each day the offence continues.

Question 29:

Are current maximum fine levels, for individuals and corporations, appropriate?

iv) Reprisals

To ensure that employees at all levels of an organization participate in and support the IRS, they must not be afraid of losing their jobs or being penalized or disciplined when they raise health and safety concerns. The Act, therefore, prohibits an employer from taking any reprisal against an employee who has acted in compliance with the Act or the regulations or an order, has sought enforcement of the Act or regulations, or has given evidence at an inquest or a prosecution.

Protection from reprisals appears to be a universal element in the health and safety legislation of other provinces. In Manitoba, New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island, a trade union or person acting on behalf of a trade union, as well as an employer, is prohibited from taking reprisals against an employee. Similarly, Alberta's Act broadly specifies that "no person" shall take disciplinary action against an employee for acting in compliance with the Act.

Most provinces provide a mechanism by which an employee can challenge an employer's reprisal. In Ontario, an employee who feels unjustly disciplined or penalized can have the matter dealt with through the grievance procedure under a collective agreement, if there is one, or can refer the matter to the Ontario Labour Relations Board.

Similarly, employees in New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island can also have the matter dealt with through the grievance procedure under a collective

agreement, if there is one, or can refer the matter to a government tribunal or body such as a Labour Board or advisory health and safety council.

In Alberta's and Saskatchewan's legislation, an employee can complain of an alleged reprisal to a health and safety officer/inspector, who can then investigate the complaint. But only in Saskatchewan does the officer/inspector issue orders upon finding the employer has taken discriminatory action, contrary to the practice in Ontario.

Stakeholders have raised several issues respecting the reprisal provision in the Act:

- that employees in non-unionized workplaces have no choice but to complain to the Ontario Labour Relations Board, which can be a costly, time-consuming and intimidating process for the employee;

- that Ministry inspectors should be able to investigate and render decisions on whether an employee has been unjustly disciplined by the employer;

- that the burden of proof on the employer should be eliminated;

- that the prohibition should apply to all workplace parties, not just the employer; and,

- that unionized employees should use existing grievance procedures rather than the OLRB for dealing with complaints about reprisals.

Question 30:

How can the reprisal provision be modified to improve its effectiveness and to make workplace parties more accountable for their actions?

E. Miscellaneous Issues

There are several miscellaneous issues related to the Act and its administration upon which the Ministry is inviting comment.

The Notification of New Substances - Section 34

Section 34 of the Occupational Health and Safety Act requires anyone who intends to manufacture, distribute or supply a new substance for commercial or industrial use to first notify the Ministry of Labour in writing.

When the Act came into force in 1979, it was the first occupational health and safety legislation in Canada that contained such requirements for the notification of new substances.

The purpose of this requirement was to give the Ministry a way to monitor the introduction of new substances into Ontario workplaces, assess their toxicity and to ensure that exposed employees are properly protected.

In recent years, other legislation affecting the introduction of new substances into Ontario workplaces has been passed, for example, legislation to implement the Workplace Hazardous Materials Information System (WHMIS) in 1988; and federal new substance notification requirements under the Canadian Environmental Protection Act (CEPA), which came into force in 1994. The general purpose of the federal provisions is to ensure that no new substance is introduced into the Canadian marketplace before an assessment of the impact on human and environmental health has been carried out.

Both WHMIS and CEPA have elements in common with section 34, leading to duplication of requirements.

Question 31:

Should requirements respecting the notification of new substances (section 34) be repealed?

Other issues that the Ministry is reviewing and invites comment on include:

- sections in the Act that provide for requirements to be prescribed by regulation, where no regulations have been developed;
- amendments to sections 54(1)(e) and (f) to include ergonomics testing and other qualitative workplace assessments;
- sections 30(5) and (6), dealing with owner and constructor liability; and,
- consolidation in the Act of all requirements to pay for certification training and repeal of O. Reg. 780/94, Training Programs.

V HOW YOU CAN PARTICIPATE

During the next few months, the government will be consulting interested parties on reforms to the Occupational Health and Safety Act. This process will be extensive, involving informal meetings with individuals and groups in Toronto, and in the following regional centres: Windsor, Kitchener-Waterloo, Niagara Falls, Thunder Bay, Sudbury, Kingston and Ottawa. There will also be a careful review of all written submissions made during this time.

Subsequently, the government intends to introduce proposed amendments to the Act. Such amendments would have to be approved by the Legislature in order to take effect. The Legislature's own processes, which include legislative debate, would give additional opportunity for discussion and public input.

The government invites written submissions from all interested parties. They should be received by the Ministry of Labour no later than April 30, 1997 and sent to the following address:

Elizabeth Witmer, MPP
Minister of Labour
Occupational Health and Safety Act Review
400 University Avenue, 15th Floor
Toronto, Ontario
M7A 1T7

Attention: Project Leader

You may also send your comments to the Ontario Government's e-mail address at: ohsa@gov.on.ca and you may visit our web site at: http://www.gov.on.ca/LAB/main.htm

For additional copies of this discussion paper, or for inquiries about the consultation process, please call the Ministry of Labour, Communications Branch, at (416) 326-7400.